

## 48A C.J.S. Judges § 328

Corpus Juris Secundum | August 2023 Update

### Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

### IX. Disqualification to Act

#### D. Objections to Judge and Proceedings Thereon

##### 3. Determination of Objection to Judge

## § 328. Determination of disputed issues; hearing

[Topic Summary](#) | [References](#) | [Correlation Table](#)

### West's Key Number Digest

West's Key Number Digest, [Judges](#) 51(4)

**Where the grounds for disqualification are disputed, the facts constituting the disqualification must be judicially established by proper procedure, generally a hearing on the merits.**

Under some statutes, the filing of a legally sufficient affidavit is not conclusive of the judge's disqualification,<sup>1</sup> and disqualification may be made an issue to be determined on the evidence adduced by the parties.<sup>2</sup> Where the grounds for disqualification are disputed, the facts constituting the disqualification must be judicially established by proper procedure.<sup>3</sup> This may consist of a hearing on the merits;<sup>4</sup> however, there is authority that such a hearing is not required<sup>5</sup> or contemplated,<sup>6</sup> or is discretionary with the court,<sup>7</sup> and in any event, a hearing on a recusal motion is not required to be an evidentiary hearing,<sup>8</sup> particularly where all the evidence is already before the court.<sup>9</sup>

The motion may be heard on testimony of witnesses or on affidavits, or both,<sup>10</sup> and the opposing party has a right to be heard on a motion to recuse.<sup>11</sup> A judge whose integrity, probity, and candor is questioned in a motion to disqualify has a duty to defend the conduct of the court in which the judge is presiding.<sup>12</sup> Where a hearing to determine the merits of a petition for substitution of judge is improperly withheld, the allegations of the petition as to the prejudice of the judge and the time when knowledge came to the party must be taken as true.<sup>13</sup> If the original affidavit is insufficient, the judge may ignore it or strike it from the files.<sup>14</sup> Where the facts alleged to disqualify a judge are unchallenged or admitted, the question of disqualification is one of law, and no hearing is required.<sup>15</sup>

If a judge is objected to because of relationship to a party, and also because of interest, the question of interest should be determined first.<sup>16</sup> It has been held that pending determination of the judge's qualification, the judge has no authority to act in the case,<sup>17</sup> and if the judge erroneously refuses to entertain a motion to disqualify, all further proceedings before the judge are nugatory.<sup>18</sup> On the other hand, it has been said that the mere filing of a motion for substitution of a judge for cause does not affect the trial court's power or authority,<sup>19</sup> and the court's ruling on such motion, even if erroneous, is not a jurisdictional defect.<sup>20</sup>

The manner of service of an order referring a motion to recuse is of no importance where the judge to whom it is referred acts on the order.<sup>21</sup> Where the statute makes no provision for formal procedure, notice to the parties of the time and place when the judge designated will hear and determine the regular judge's qualification is not necessary.<sup>22</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Defendant failed to rebut presumption that judge was unbiased and unprejudiced in denying his three sentence-modification petitions and motion to correct errors relating to his 50-year sentence for dealing and conspiracy to commit dealing in cocaine; defendant provided absolutely no evidence to support bias claim. [Vazquez v. State](#), 37 N.E.3d 962 (Ind. Ct. App. 2015).

## [END OF SUPPLEMENT]

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### Footnotes

1 Ohio—[Tumbleson v. Noble](#), 109 Ohio App. 2d, 10 Ohio Op. 2d 470, 164 N.E.2d 808 (2d Dist. Fayette County 1959).

Utah—[Cox v. Dixie Power Co.](#), 72 Utah 236, 269 P. 1000 (1928).

2 Tex.—[Taylor v. Batte](#), 145 S.W.2d 1116 (Tex. Civ. App. Austin 1940).

#### Parties afforded opportunity to brief case

Fla.—[Department of Revenue v. Leadership Housing, Inc.](#), 322 So. 2d 7 (Fla. 1975).

3 Ga.—[Savage v. Savage](#), 234 Ga. 853, 218 S.E.2d 568 (1975).

Ind.—[Leistikow v. Hoosier State Bank of Indiana](#), 182 Ind. App. 150, 394 N.E.2d 225 (1979).

Kan.—[State v. Ames](#), 222 Kan. 88, 563 P.2d 1034 (1977).

4 Ga.—[Gude v. State](#), 289 Ga. 46, 709 S.E.2d 206 (2011).

Ill.—[In re Estate of Wilson](#), 238 Ill. 2d 519, 345 Ill. Dec. 583, 939 N.E.2d 426 (2010).

Ind.—[Bradberry v. State](#), 160 Ind. App. 202, 311 N.E.2d 437 (1974).

5 Ky.—[Diaz v. Barker](#), 254 S.W.3d 835 (Ky. Ct. App. 2008).

6 Cal.—[People v. Powell](#), 40 Cal. App. 3d 107, 115 Cal. Rptr. 109 (2d Dist. 1974).

Colo.—[Brouwer v. District Court of First Judicial Dist.](#), 169 Colo. 303, 455 P.2d 207 (1969).

Idaho—[State v. Bitz](#), 93 Idaho 239, 460 P.2d 374 (1969).

7 U.S.—[U.S. v. Marin](#), 662 F. Supp. 2d 155 (D.D.C. 2009).

8 U.S.—[U. S. v. Zagari](#), 419 F. Supp. 494 (N.D. Cal. 1976).

Ark.—[Stilley v. Perry](#), 372 Ark. 259, 273 S.W.3d 492 (2008).

**Argument by counsel sufficient**

Ill.—[People v. Polk](#), 55 Ill. 2d 327, 303 N.E.2d 137 (1973).

**No right to evidentiary hearing**

U.S.—[In re Wolverine Proctor & Schwartz, LLC](#), 397 B.R. 179 (Bankr. D. Mass. 2008).

9 Ind.—[Brown v. State](#), 266 Ind. 82, 360 N.E.2d 830 (1977).

10 Mass.—[King v. Grace](#), 293 Mass. 244, 200 N.E. 346 (1936).

**Request for hearing essential**

Ariz.—[State v. Schutte](#), 117 Ariz. 482, 573 P.2d 882 (Ct. App. Div. 1 1977).

**Hearing of evidence essential**

Tex.—[Pinchback v. Pinchback](#), 341 S.W.2d 549 (Tex. Civ. App. Fort Worth 1960), writ refused n.r.e., (Apr. 26, 1961).

**Oral argument in chambers**

Ill.—[People v. Spurlark](#), 67 Ill. App. 3d 186, 23 Ill. Dec. 860, 384 N.E.2d 767 (1st Dist. 1978).

11 Me.—[Bond v. Bond](#), 127 Me. 117, 141 A. 833 (1928).

12 Mich.—[Harvey v. Lewis](#), 10 Mich. App. 23, 158 N.W.2d 809 (1968).

13 Ill.—[People v. Arnold](#), 76 Ill. App. 2d 269, 222 N.E.2d 160 (1st Dist. 1966).

14 Cal.—[Ensher, Alexander & Barsoom, Inc. v. Ensher](#), 225 Cal. App. 2d 318, 37 Cal. Rptr. 327 (3d Dist. 1964).

15 Tex.—[Maxey v. Citizens Nat. Bank of Lubbock](#), 489 S.W.2d 697 (Tex. Civ. App. Amarillo 1972), writ granted, (May 30, 1973) and judgment rev'd on other grounds, 507 S.W.2d 722 (Tex. 1974).

16 La.—[State v. Livaudais](#), 161 La. 882, 109 So. 536 (1926).

17 La.—[State v. Savoy](#), 207 La. 982, 22 So. 2d 402 (1945).

Ohio—[Cuyahoga County Bd. of Mental Retardation v. Association of Cuyahoga County Teachers of Trainable Retarded](#), 47 Ohio App. 2d 28, 1 Ohio Op. 3d 168, 351 N.E.2d 777 (8th Dist. Cuyahoga County 1975).

W. Va.—[Shenandoah Sales & Service, Inc. v. Assessor of Jefferson County](#), 228 W. Va. 762, 724 S.E.2d 733 (2012).

18 Ga.—[Bryant v. Mitchell](#), 195 Ga. 135, 23 S.E.2d 410 (1942).

Wyo.—[Washakie Livestock Loan Co. v. Meigh](#), 47 Wyo. 161, 33 P.2d 922 (1934).

19 Ill.—[People v. Robinson](#), 18 Ill. App. 3d 804, 310 N.E.2d 652 (1st Dist. 1974).

**Holding of hearing**

Since the court held a hearing on defendant's motion for substitution of the judge for cause, proceedings subsequent to the court's ruling were not void even if the ruling itself was erroneous.

Ill.—[People v. Robinson](#), 18 Ill. App. 3d 804, 310 N.E.2d 652 (1st Dist. 1974).

21 La.—[State v. Bryan](#), 175 La. 422, 143 So. 362 (1932).

22 Cal.—[Bixby v. Hotchkis](#), 72 Cal. App. 2d 368, 164 P.2d 808 (2d Dist. 1945).

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